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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1009

JOHNNIE MAE JONES (DANIELS),
Petitioner,
vs.
PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

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No. .....

JOHNNIE MAE JONES (DANIELS),
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vs.
PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

Petitioner, Johnnie Mae Jones Daniels, defendant below, prays that a Writ of Certiorari issue to review a final decision of the Court of Appeals of the State of Michigan, entered in the above-entitled case on July 23, 1968, application for leave to appeal therefrom having been denied by the Supreme Court of Michigan on October 10, 1968.

OPINIONS BELOW

The Supreme Court of Michigan, in denying petitioner's application for leave to appeal from a decision of the Court of Appeals for the State of Michigan, wrote no opinion. The opinion of the Court of Appeals for the State of Michigan, rendered on July 23, 1968, is not yet reported in Michigan Appeals Report, or in the Northwest Reports, Second Series. A copy of the denial of petitioner's application for leave to appeal and a copy of the opinion of the Court of Appeals for the State of Michigan are appended hereto as Appendices A and B, respectively.

Petitioner was convicted of breaking and entering in violation of Michigan Compiled Laws 1948, §750.110 (M.S.A. 1962 Rev. §28.305), following trial by jury in the Circuit Court for the County of Muskegon, State of Michigan, which ended on December 10, 1965. On July 23, 1968, the Court of Appeals for the State of Michigan affirmed the conviction. On October 10, 1968, the Supreme Court of the State of Michigan denied petitioner-defendant's application for leave to appeal.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

Petitioner is a female negro, born in Newton, Mississippi, now 36 years old, with an eleventh grade education. During all of the time pertinent hereto, she resided in Chicago, Illinois, where she currently resides with her husband, Ishmael Daniels.

Strong's Jewelry Store, Muskegon, Michigan, was broken into and entered in the early morning hours of November 24, 1964, some $1,500.00 to $1,700.00 worth of jewelry being stolen and never recovered. The Muskegon, Michigan police arrived on the scene sometime between 3:30 and 3:45 a.m., broke up the burglary attempt while it was in progress, and chased two or three male subjects from the back of the store down an alley to Isabella Street, one-half block south of the store. Petitioner was observed in her automobile by one of the officers in pursuit apparently pulling away from the curb on Isabella Street on the wrong side of the street and without lights, whereupon the officer yelled to an approaching police car, "Stop that car and don't let it get away!" The car was stopped, and the petitioner was identified and arrested. She was taken from her car and placed in an adjacent police car. Further passage of her car was blocked by the said police car.

Meanwhile, the pursuit of the two or three males continued, and ultimately resulted in the arrest of Eugene Wright at the rear of a house several doors east on Isabella Street. Wright was brought to the same police car in which petitioner was seated and was placed in the car and kept in custody. Shortly thereafter, Police Lieutenant Arnold Van Dam arrived in a police car, viewed the scene of the crime, then went to the police car in which the two subjects were seated and learned of the circumstances of their arrest. He walked from there to petitioner's car, shined his flashlight therein, and removed the keys from the ignition. Lt. Van Dam then returned to the store for further investigation. Approximately 45 minutes later, having completed his investigation, Lt. Van Dam ordered the two policemen holding petitioner and Wright in custody to transport the prisoners to jail, better than one mile distant. Shortly thereafter, Lt. Van Dam "received addi-

tional information concerning the larceny" and radioed the car in which the petitioner was being transported and ordered her returned to the point of her arrest so that he could again search her car. When petitioner was returned, Lt. Van Dam gave her her keys and told her to open her trunk. Petitioner did so reluctantly, stating ". . . I will not give you permission, but that wouldn't stop you anyway." Van Dam searched the trunk and found nothing significant. Next, he crawled into the car and removed the back seat, where he found a crowbar and bolt cutters. The crowbar later became a very critical piece of evidence in petitioner's trial when testimony was offered that it contained paint chips and cement and stone dust similar to that found at Strong's Jewelry Store.

The question presented is: Whether a search without a warrant of an automobile, to the extent that the back seat is removed, some 45 minutes or more after the arrest of the driver thereof, who was alone, and after the driver had been dispatched from the scene of her arrest to jail and then brought back to the scene for the sole purpose of conducting a search of her automobile in her presence predicated on additional information gained in the meantime by the police, is a search so remote as to be not incidental to and contemporaneous with her arrest and, therefore, illegal, rendering the evidence recovered thereby inadmissible against her.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 11 of the Constitution of the State of Michigan, 1963 (Appendix C).

STATEMENT OF THE CASE

Appendix B, page 18, contains a sketch which depicts the subject area to which this petition relates.

In the early morning hours of November 24, 1964, several residents in the vicinity of Strong's Jewelry Store, Muskegon, Michigan, were awakened by loud noises coming from the direction of the store. The residents noticed what appeared to be a telephone company truck with an hydraulic tailgate backed up to the back door of the jewelry store, and something similar in shape and size to a safe partially loaded onto the truck. The police were notified and sometime between 3:30 and 3:45 a.m., the first police arrived at the scene of the disturbance. At least two men fled the scene and the police closely pursued them on foot. The men ran in a southerly direction down an alley behind Strong's Jewelry Store toward Isabella Street, and made a turn to their left—that is, toward the east—as they ran into Isabella Street, still pursued by the police. At that point, the petitioner was observed in her automobile, a 1959 Pontiac Bonneville, light green in color, apparently pulling away from the south curb on Isabella Street, without lights and headed in the wrong direction. At that moment a second police car came around the corner from Getty Street, on which Strong's Jewelry Store fronted, and one of the pursuing officers yelled to the officers in that car.

"Stop that car and don't let it get away!" The petitioner's car was halted and petitioner was taken into custody and was placed in the police car blocking her car.

A short time later, Eugene Wright, co-defendant with petitioner in the trial of this cause, and an acquaintance of petitioner, was taken into custody in a back yard several houses east on Isabella Street. Wright was brought to the same police car in which petitioner was seated, and was placed in the car with petitioner.

At approximately 3:51 a.m., Police Lieutenant Arnold Van Dam arrived on the scene. He went first to the store, then to the police car in which petitioner and Wright were being held. He recognized petitioner, spoke to her briefly, then went to her car. He shined his flashlight in the car, saw petitioner's keys in the ignition, removed the keys and checked the car. Van Dam then returned to the store for further investigation of the robbery.

When he had completed his investigation at the scene of the burglary, some 45 minutes later, Van Dam ordered the police in the cruiser in which petitioner and Wright were seated to proceed to the Muskegon County Jail. Pursuant to that order, the cruiser with petitioner under arrest proceeded toward the police station, leaving petitioner's car back on Isabella Street. A few minutes later, Van Dam received what he called "additional information concerning the larceny" and radioed the cruiser to return petitioner to the corner of Isabella and Getty Streets so that he could search her car again. When petitioner arrived back at the scene of her arrest, Van Dam handed petitioner's keys to her and ordered her to open her trunk, which she did reluctantly. Van Dam then searched the trunk and found nothing significant. Then Van Dam made a separate search of the car. He crawled into the car and removed the back seat, finding a crowbar and bolt cutters under the

seat. Testimony was adduced at the trial that the crowbar bore traces of paint and cement and stone dust similar to the paint and dust found at Strong's Jewelry Store.

Petitioner took the stand in her own defense at her trial. She was 32 years old at the time of her arrest, and the mother of two children. She lives in Chicago, Illinois and was living there at the time of the alleged breaking and entering. At that time, however, her children were temporarily living with her mother in Muskegon, and she came to Muskegon on November 22, 1964 because her oldest daughter, Gail, was in trouble and needed her help. On the night of November 23, at approximately 10:00 or 10:30 p.m., petitioner telephoned Father Albert Stratz, Pastor of St. Joseph's Parish, Muskegon, Michigan, of which petitioner was a member, to inquire as to what steps could be taken to provide institutional care for her daughter. Father Stratz recommended that Gail be taken to Villa Maria, an institution for troubled girls in Grand Rapids, Michigan. Petitioner testified that she was upset at the prospect of institutionalizing her daughter and that, unable to sleep, she got into her car and drove aimlessly for several hours, which brought her to the vicinity of Strong's Jewelry Store. She testified that as she turned onto Isabella Street, one-half block from Strong's Jewelry Store, she heard unusual noises off to her right, and saw five or six people running. She testified that she turned off her lights to eliminate their reflection in order to get a better view. It was at that point that she was arrested.

Petitioner testified that her car had been stolen in Chicago on November 14, 1964, and returned that same night. Her testimony in that respect was substantiated by a Chicago, Illinois police officer. She testified she did not know the crowbar was under the back seat, nor how it came to be there, opining only that it could have been placed there by whoever took her car on November 14, 1964.

On arraignment on a warrant authorized by the Prosecuting Attorney, Muskegon County, Michigan, on November 24, 1964, petitioner demanded a preliminary examination. The examination was held by the Honorable Harold J. Steendam, Municipal Judge for the City of Muskegon, on December 11, 1964. Petitioner-defendant was bound over to Circuit Court at the completion of the preliminary examination.

On November 18, 1965, petitioner-defendant filed a Motion to Suppress evidence of the crowbar in the Circuit Court for Muskegon County, alleging unlawful search and seizure under the Constitution of the United States and Article I, Section 11 of the Constitution of the State of Michigan, 1963. Argument was heard by the Trial Court on the said motion on November 22, 1965 and the motion was denied on December 7, 1965.

On December 8, 1965, during the trial, petitioner-defendant renewed her Motion to Suppress during the testimony of Lieutenant Arnold Van Dam. Decision on the Motion was not made at that time pending the introduction of foundation testimony (Appendix D). Later during the trial, defense counsel asked for a ruling on the motion and the Court affirmed its determination of December 7, 1965, and admitted the crowbar into evidence (Appendix E). Defense counsel raised the issue again at the conclusion of the People's proofs, and the Trial Court denied petitioner-defendant's Motion to Dismiss (Appendix F).

Following trial by jury, petitioner-defendant was convicted of breaking and entering on December 10, 1965, and was sentenced on January 5, 1966 to a term of three to ten years.

The question of the admissibility of the crowbar was next raised in the Court of Appeals for the State of Michi-

gan, as the second of three issues on appeal (Appendix B). When the Court of Appeals affirmed the judgment of the Trial Court (although stating "This is admittedly a close question"), petitioner-defendant applied for leave to appeal to the Supreme Court of the State of Michigan, one of the questions raised being the legality of the search of her automobile (Appendix G). Petitioner-defendant's application for leave to appeal was denied (Appendix A).

Petitioner-defendant was on bond pending appellate review of her conviction. Upon denial by the Supreme Court of the State of Michigan of her application for leave to appeal, the Trial Court granted a stay of execution of sentence, predicated in part on heart disability first suffered by petitioner-defendant in September, 1967, and in part on her expressed intention to seek review by Writ of Certiorari in the Supreme Court of the United States. A petition for stay of execution of sentence was filed in the Supreme Court of the State of Michigan on October 25, 1968, and was conditionally granted on December 12, 1968 (Appendix H).

The search of petitioner's car at least 45 minutes after her arrest and after she had been taken by police car from the scene of the arrest and then returned to the scene, was not incidental to and contemporaneous with her arrest and, having been made without a warrant, was illegal. If probable cause existed for petitioner's arrest, it also existed for a search warrant. The car was in police custody, petitioner was also in custody, and no emergency conditions existed justifying a search beyond that conducted by Lt. Van Dam when he first identified petitioner as driver of the vehicle, shined his flashlight inside the car and took the keys from the ignition. The evidence obtained by reason of the illegal search should not have been admitted. Where all of the evidence against the petitioner was purely cir-

cumstantial, there being no direct evidence of her participation in the burglary, the crowbar was extremely vital to the prosecution's case against her, and the "harmless error" rule clearly does not apply.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the State of Michigan, whose opinion was tacitly adopted by the Supreme Court of Michigan when it denied petitioner's application for leave to appeal therefrom, stated with reference to the issue on which this petition is based, "This is admittedly a close question and we note that our decision is confined to these facts . . ." (Appendix B, p. 26).

The question in this case, confining the issue to "these facts", is whether one of two cases is controlling, *Preston v. United States* (1964), 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777, or *Cooper v. California* (1967), 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730, or alternatively, whether neither *Preston* nor *Cooper* controls, and the test is simply one of "reasonableness". *United States v. Rabinowitz* (1950), 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653.

Clearly, *Cooper* can be distinguished on its facts. Here there are none of the circumstances on which that case was predicated. First and foremost, in *Cooper,* California's Attorney General conceded that the search was *not incidental* to arrest, whereas here it is the prosecutor's claim that the search is valid because it *was* incidental to the arrest. In addition, it cannot be overlooked that *Cooper* was decided within the framework of Section 11611 of the California Health and Safety Code which imposes a duty on officers making arrests for narcotics violations to seize and deliver any vehicle used to facilitate the possession of narcotics, requiring further that such vehicle "be *held*

as evidence until a forfeiture has been declared or a release ordered." 386 U.S. 58, 60, 17 L. Ed. 2d 730, 733. Granted, the majority declared that ". . . the question here is not whether the search was authorized by State law. The question is rather whether the search was reasonable under the Fourth Amendment." 386 U.S. 58, 61, 17 L. Ed. 2d 730, 733. But then to test the reasonableness of the search, the majority considered the following as important factors: (1) that the car was seized by the officers because *state law required* them to seize it; (2) that the car was seized so that it could be impounded; (3) and that the officers were required to keep it until forfeiture proceedings were concluded. In consideration of which the Court concluded: "Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding." 386 U.S. 58, 62, 17 L. Ed. 2d 730, 734.

Preston v. United States, while not on all fours, is more applicable here. One admittedly distinguishing factor is that in *Preston* the subjects were arrested for vagrancy, whereas here, petitioner was arrested for something more substantial, although the trial record does not show that when she was arrested near the corner of Isabella and Getty Streets she was either formally or informally advised of the charges against her. Significantly, however, the fact that the subjects in *Preston* were arrested for vagrancy did not, *per se,* form the basis of the Court's opinion in that case.

In *Preston,* the Court framed the following question as the issue before it. ". . . (W)hether the facts of this case are such as to fall within any of the exceptions to the constitutional rule that a search warrant must be had before a search may be made." 376 U.S. 364, 367, 11 L. Ed. 2d

777, 780. And having considered "the need to seize weapons and other things which might be used to assault an officer or effect an escape", and "the need to prevent the destruction of evidence of a crime", 376 U.S. 364, 367, 11 L. Ed. 2d 777, 780, the Court stated its conclusion: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest . . . (T)here was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . . Nor, since the men were under arrest . . . and the car was in police custody . . . was there any danger that the car would be moved out of the locality or jurisdiction." 376 U.S. 364, 367, 368, 11 L. Ed. 2d 777, 780, 781. And with that the Court ruled "that the search was too remote in time or place to have been made as incidental to the arrest . . ." and ". . . the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." 376 U.S. 364, 368, 11 L. Ed. 2d 777, 781.

Preston is further distinguished by the fact that the automobile searched was actually taken to another *place* before it was searched, whereas here it was not moved from the point of its interception. Without saying so in so many words, the Court quite obviously considered the transfer of the car to another place as being an interruption of incidence. "We think that the search was too remote in time *or place* to have been made as *incidental* to the arrest . . ." 376 U.S. 364, 368, 11 L. Ed. 2d 777, 781. (Emphasis added).

In this case, the car was not transferred to another place, *but petitioner-defendant was.* While petitioner-defendant was already in custody and seated in a police car, Lt. Van Dam checked her car, shining his flashlight there-

in and removing the keys. Thereafter, upon his orders, she was taken to jail, whether she arrived there or not, and was then brought back to the scene of her arrest to "meet Officer Van Dam there for a *further* check on the vehicle," (Trial Trans. p. 211), predicated on "additional information concerning the larceny" received by Van Dam *after* he had ordered the petitioner-defendant taken downtown to jail. (Trial Trans., pp. 143-144).

This is not a case where both the arrested party and the car were taken to some place of convenience and later searched, as in *Preston*. This is a case where the car was first searched, however cursorily, moments after petitioner-defendant's arrest, and then again searched nearly an hour later *after* petitioner-defendant had been removed from the scene and then brought back because of "additional information" the police received while she was gone. It is the incidence and contemporaneousness of the *second* search that is challenged here. Indeed, the courts have said that no matter how valid an arrest may be in a technical sense, it may not be used merely as a pretext for making a search, *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726 (1963), *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932), and any search predicated on such pretext must fail in its constitutionality. *Taglavore v. United States*, 291 F.2d 262 (9 Cir., 1961); *Henderson v. United States*, 12 F.2d 528 (4 Cir., 1926). Just as arresting a person in a place which is not his home does not justify a search of his home without a warrant, *Agnello v. United States*, 269 U.S. 20, 70 L. Ed. 145 (1925), so also an arrest may not be maneuvered to occur on the premises in order to search those premises, *McKnight v. United States*, 183 F.2d 977 (D.C. Cir., 1950); *United States v. Scott*, 149 F. Supp. 837 (D.C.D.C., 1957). Lieutenant Van Dam's action in ordering petitioner-defendant returned to the scene

of her arrest *after* he determined a need for further search of her automobile, predicated on "information" he received *after* she had been removed from the scene at his order was clearly not of an emergency nature justifying a departure from constitutional safeguards, and in reality was nothing less than a *maneuver* to avoid the time and trouble it would take to obtain a search warrant, and was, therefore, unreasonable. The same 45-minute delay the Michigan Court of Appeals "granted" the police "as being incident to the arrest" (Appendix B, p. 26) became an undue delay, taking it well beyond the scope of *Crawford v. Bannan*, 336 F.2d 505 (6 Cir., 1964), cert. den. 381 U.S. 955 (1965) wherein the Court of Appeals for the Sixth Circuit placed great emphasis on the *contemporaneous* nature of the search therein found to have been valid.

As for petitioner-defendant's consent to and participation in the circumstances leading to the search, it is clear that any such consent was involuntary. Nobody ever explained her Fourth Amendment rights to her, and she did not know that she had a right to withhold her consent. *United States v. Page*, 302 F.2d 81 (9 Cir., 1962); *Channel v. United States*, 285 F.2d 217 (9 Cir., 1960); *Judd v. United States*, 190 F.2d 649 (D.C. Cir., 1951); *Ray v. United States*, 84 F.2d 654 (5 Cir., 1936). Van Dam himself testified as to her reluctance to permit him to search her car: "She said she didn't like it, . . ." (Trial Trans., p. 144), and, again: "I asked Mrs. Jones, or rather I told her that I would like to look through her car. She said that she didn't like it, . . ." (Trial Trans., p. 234). Her reluctant cooperation clearly did not constitute a waiver of her Fourth and Fourteenth Amendment rights. Indeed, the presumption is against any such waiver, *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461 (1933), and it is obvious from the testimony of Van Dam himself that the prosecution did not overcome that presumption. Finally, this Court

has long since held that mere submission or non-resistance to the authority of a police officer is not a waiver of a person's constitutional rights. *Amos v. United States*, 255 U.S. 313, 65 L. Ed. 654 (1921).

The crowbar found in petitioner's car was the fruit of an illegal search, and it should not have been admitted into evidence. Its admission was constitutional error, *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(Michigan Supreme Court—Docket No. 52,136)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 10th day of October in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable John R. Dethmers, Chief Justice, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Michael D. O'Hara, Paul L. Adams, Thomas E. Brennan, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby denied, for the reasons that defendant and appellant has failed to persuade the Court that she has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of October in the year of our Lord one thousand nine hundred and sixty-eight.

Donald F. Winters,
Clerk.

APPENDIX B

OPINION OF THE COURT OF APPEALS

STATE OF MICHIGAN—COURT OF APPEALS
Division 3

People of the State of Michigan,
Plaintiff-Appellee,
v.
Johnnie Mae Jones and
Eugene Wright,
Defendants-Appellants.

No. 1697 and 1722

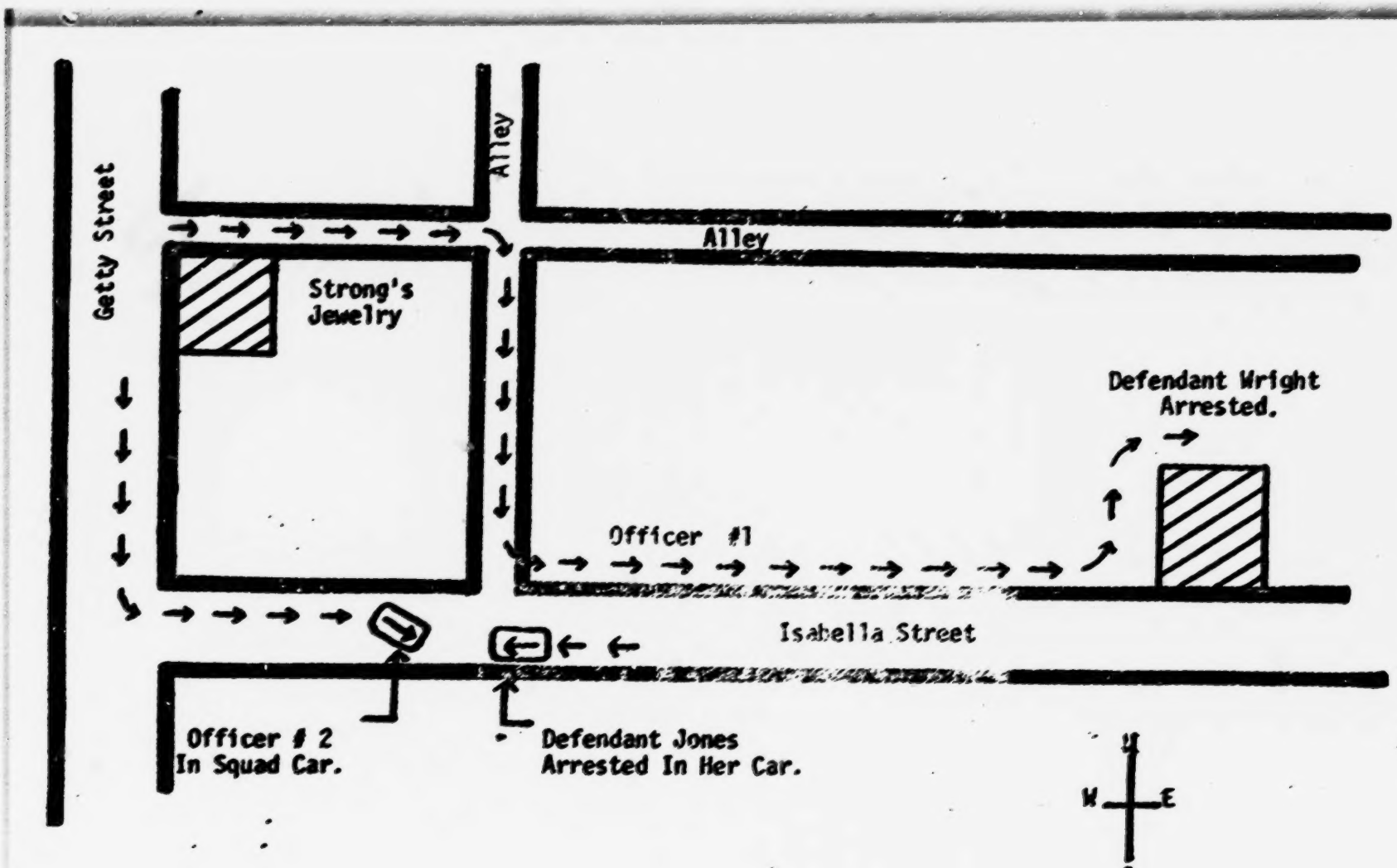
Before: Fitzgerald, P.J., J. H. Gillis and G. Bowles, J.J.

Fitzgerald, P.J.

The defendants were tried together and convicted by a jury in the circuit court for the county of Muskegon of the crime of breaking and entering.[1] They both appeal their conviction to this Court alleging slightly different errors in their particular conviction. The facts of their apprehension are not disputed.

Reference is made to the map of the area. The police were summoned to the area. Officers #1 and #4 began chasing 3 men from the jewlery store south down the alley to Isabella street, then east on Isabella. Officer #2 drove his police car down Getty street and stationed himself on Isabella street. While running, Officer #1 noticed a 1959 Pontiac slowly moving west on Isabella on the south side of the street with the lights out. He shouted, "Stop that car." Officer #2 did so and arrested the driver, defendant

[1] CL 1948, §750.110 (Stat Ann 1962 Rev §28.305).


Getty Street
Alley
Alley
Strong's
Jewelry
Defendant Wright
Arrested.
Officer #1
Isabella Street
Officer # 2
In Squad Car.
Defendant Jones
Arrested In Her Car.
W
E

Johnnie Mae Jones. Officers #1 and #4 arrested defendant Eugene Wright behind a house further east on Isabella street. Defendant Jones was placed in the police cruiser and Officer #3 took the keys of the 1959 Pontiac automobile and gave it a cursory search.

Officer #2 started driving both defendants to jail, but upon reaching the jail he was told by radio to return the defendants to the scene of the incident immediately. He did so, the 1959 Pontiac was searched by Officer #3 in the presence of defendant Jones, and a crowbar was seized from the vehicle. That crowbar was later introduced into evidence at the trial.

Two issues are raised by defendant Jones: (1) Was her arrest lawful in that the arresting officer had probable cause to believe that she was engaged in a felonious act? (2) Was the search of her car, without a warrant, after she had left the scene and then returned in the custody of the police, and the introduction into evidence of a crowbar then seized, in violation of the Fourth Amendment to the U. S. Constitution and Const 1963, art 1, §11?

Defendant Wright raises these same 2 issues and alleges that if we find the arrest of defendant Jones and the search and seizure of the crowbar from her car to be illegal, then his conviction was error in that the crowbar was admitted in the consolidated trial. He admits that if the crowbar was properly obtained and introduced, then his conviction must stand. Defendant Jones raises a third issue which will be considered separately.

We first consider whether Officers #1 and #2 had reasonable cause to believe that defendant Jones was in some way connected with the felony. She refers us to the holding of the Supreme Court of this State in the case of *People v. Zeigler* (1960), 358 Mich 355, which limits review on

appeal of the propriety of a denial of a motion to suppress evidence to that evidence adduced at the preliminary hearing. Also, see *People v. Kaigler* (1962), 368 Mich 281. By the application of this rule, defendant Jones would then say that insufficient cause was shown at that time to permit the introduction of the crowbar as it was allegedly the product of an illegal seizure following an illegal arrest. The circumstances of the arrest could not be amplified at the trial:

> "Where a motion to suppress has been passed upon by the trial judge before the trial, the matters should not be gone into again upon the trial." 2 Gillespie, Michigan Criminal Law and Procedure, §874.

However, the trial court did allow the motion to suppress to be renewed by the defendant Jones and a final decision was postponed until the testimony of the officers was had in chronological order. The above rule is applied to prevent the jury from considering the manner in which evidence is obtained. In the present case, the renewed motion and arguments presented were made out of the presence of the jury and although the trial court should have ceased the debate at its inception, we do not find the argument to be prejudicial to the defendant or the People. Cf. *People v. Blessing* (1966), 378 Mich 51.

We will limit our review on appeal in deference to the *Zeigler* rule, and find from the record made at the preliminary examination that Officer #2 had reasonable cause to stop and arrest the defendant Jones. Testimony there taken was limited by an application of the hearsay rule as to the communications received by the officers in their police cruiser radios which motivated them to proceed to the jewelry store. Such testimony was permitted on the trial. We make reference to CL 1948, §764.15 (Stat Ann 1954 Rev §28.874):

"Sec. 15. Any police officer may, without a warrant, arrest a person—

* * *

"(c). When a felony in fact has been committed and he has reasonable cause to believe that such person has committed it;

"(d) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it;

"(f) When he has received such positive information broadcast from any recognized police or other governmental radio station, or teletype, as may afford him reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it."

Again, the court is faced with the task of applying a definition of "reasonable cause" to the particular facts of a case. The officers clearly had knowledge of the occurrence of a breaking and entering. Three witnesses had been awakened by noises emanating from the jewelry store and they called the police. Their precise revelations to the police were properly excluded by the hearsay rule, but they could testify as to their own observations made at that time. We disagree with the argument that the police officers be prohibited from stating any purpose for their going to the jewelry store, and find that their presence at that location "as a result of a police call" may be considered in determining reasonable cause for their actions there within the limitations of the hearsay rule.

Thus, we have the officers arriving at the scene, but we do not know why they have been summoned. Officer #1 alights from his cruiser and sees men moving about behind

the jewelry store. They begin running down the alley toward Isabella street. Running himself, he yells, "Halt, police", but the men continue to flee and the officer takes up the chase. Upon reaching Isabella and turning east, he sees the 1959 Pontiac begin to move away from the curb on the south side of Isabella in a westerly direction with no lights on. He yells, "Stop that car, don't let it get away", and continues to pursue the fleeing men, giving warning shots from his gun. Officer #2 had arrived at the scene in another cruiser. After letting his partner out alongside the jewelry store, he drove south on Getty and turned left onto Isabella. He heard the cry of Officer #1 contemporaneously with his own observation of the 1959 Pontiac moving toward him with the lights out. He responded to the direction of Officer #1 and stopped the Pontiac, arresting its driver, Johnnie Mae Jones.

In the case of *People v. Gonzales* (1959), 356 Mich 247, the Supreme Court disallowed a search of a vehicle following its being stopped for a traffic violation. Officer #2, under no stretch of the imagination, can be said to have stopped the Pontiac with the intention of apprehending a violator of the traffic laws. We must consider the additional fact that the car was more than suspicious to a reasonable-minded police officer by reason of its proximity (one-half block) to a location to which several police cruisers had been summoned, by reason of its placement on the wrong side of the street, because of its beginning to move away when fleeing men, pursued by a police officer, passed by it and by reason of its not having lights turned on at this hour in the morning. It is true that suspicion alone is insufficient to warrant an arrest and subsequent search. *People v. Burt* (1883), 51 Mich 199. However, we refer to our detailed discussion on this issue in *People v. Wolfe* (1967), 5 Mich App 543, where it is stated:

> "The sole question we have before us is the latitude of the police in making an arrest, without warrant, based on 'prudent belief', and physical evidence visible to the world, coupled with other probative circumstances such as time of day, recognition of the suspects, and like factors."

We refer further to our discussion and reference in *Wolfe* to George, Constitutional Limitations on Evidence in Criminal Cases, Institute of Continuing Legal Education, 1966, pp 12 and 13, that it is important to find that the arresting officer must "believe" and not merely "suspect that the person arrested has committed the felony. The test is this: Would a reasonable mind have reached the same conclusion made by the arresting officer that this defendant was engaged in the commission of a felony? See *People v. Williams* (1962), 368 Mich 494; *Beck v. Ohio* (1964), 379 US 89 (85 S Ct 223, 13 L ed 142). We add a further portion of our holding in *Wolfe* for clarification of this rule:

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense."

The "reasonably trustworthy information" available to Officer #2 was provided by Officer #1 and by the independent observations of Officer #2.

Following the initial apprehension of defendant Jones, the police confirmed the details of the burglary, witnesses appeared on the scene and told of people going to and leav-

ing the jewelry store by way of Isabella street, and the defendant herself stated that she was only driving around looking for a place to have her car repaired. The time of her apprehension was approximately 3:45 a.m. In *Wolfe*, we stated:

> "The fact that Officer Smith learned the details of the commission of the crime after returning to the station house does not change the fact that he had reasonable grounds to believe that a felony had been committed."

We see no validity in curtailing the activities of police officers who are called to investigate a reported incident at 3:30 a.m., quite possibly of an illegal nature, by requiring them to alight from their converging cruisers, and stroll about the premises, building up additional reasonable causes while fleeing men pass them by and escape. In the interest of good law enforcement under the facts of this case, a darkened car a half-block away, slowly moving on the wrong side of the street, should not be permitted to leave the scene and escape with a police cruiser pulling aside to permit its passage. These are circumstances such as would properly motivate any conscientious police officer to reasonably believe that these people had, or were committing a felony.

The 2 defendants were placed in a police cruiser and they remained at the scene on Isabella until 4:30 or 4:45 a.m., whereupon Officer #2 began driving to the police station a mile away. He was summoned by radio to return the defendants to the scene and he did so before reaching the station. Upon the return, Officer #3 again searched the 1959 Pontiac in the presence of its owner, defendant Jones, and found a crowbar under the back seat. The car had not been moved from where the defendant was ar-

rested. It is this second search which is alleged to be illegal, first as the result of an illegal arrest, which has been resolved above, and second, as a violation of Const 1963, art 1, §11. Defendant refers us to the case of *Preston v. United States* (1964), 376 S Ct 364 (11 L ed 2d 777) as being definitive of the rule regarding search of an automobile without a warrant after its owner is in the custody of police. We have recently applied this rule in the case of *People v. Dombrowski* (1968), — Mich App —, holding that the search of an automobile without a warrant, after the defendant was in jail, was illegal and that the fruits or implements found in that search are inadmissible if not among the admissible contraband set forth in Const 1963, art 1, §11. The "remoteness" in time or place of the search is the objectionable factor which invalidates such evidence, as the search was not necessary to prevent the destruction or removal of evidence or the driving away of the vehicle by the defendant. We are faced with our pronouncement in *Dombrowski* that:

> "We must request the procurement of a search warrant whenever the evidence obtained is not listed among those articles admissible without a warrant, and whenever the defendant and his vehicle are in police custody previous to the search and the search is not substantially contemporaneous with the arrest."

It is settled that a search of an automobile may be made incident to an arrest, although the defendant is already in police custody. The time element involved, and the particular circumstances of the arrest, are important to the question of remoteness. We agree with the People that the search cannot always be made immediately and instantaneously after the arrest when other matters involving apprehension of other suspects and additional investigations are more pressing. Nor may the defendant already be

jailed or booked when the warrantless search takes place. *(Preston, supra.)* Then enters the "reasonableness" test of *Preston*, whereby the particular facts are tested by reference to the reasonableness of the search under the circumstances, as compared with the requirement that the officers first obtain a search warrant. See *Cooper v. State of California* (1967), 87 S Ct 788. Thus, we will grant the People the 45 minutes following the arrest of defendant Jones, while they attended to these other matters, as being incident to the arrest. The problem is that period of time, no more than 15 minutes, when she was not present at the scene while the car and the keys remained in the custody of the police. Shall we demand that at this time the requirement of obtaining a search warrant can become obligatory upon the police as the defendant is no longer present, and that any search would then not be incident to her arrest although the defendant returned before any search was made? This is admittedly a close question and we note that our decision is confined to these facts in holding that the police officers acted reasonably, under these circumstances, in searching this vehicle, for the automobile was directly relevant to the facts which created the reasonable cause for Officer #2 to arrest the defendant. A question of whether the search and seizure is unreasonable depends on the facts and circumstances of each case. *Cooper v. State of California, supra.* This search is close enough in time and place to be held to be incident to the arrest in that the time of the search was 4:45 a.m., the defendant was present and had not yet been booked, the car had not been moved, and the car was related to the cause for defendant's arrest. Under these particular facts, the search was not unreasonable and the admission into evidence of a crowbar then found in the car was not erroneous.

The appeal of defendant Wright is ended without approval of the admission of the crowbar into evidence in the consolidated trial. We do not reach the question of his standing to object to the admissibility of evidence illegally obtained from his codefendant.

Counsel for defendant Jones was limited by the trial court on cross-examination of Officer #3 because an application of the hearsay rule would hold the answer of Officer #3 inadmissible as to defendant Wright. Bolt cutters were seized from the car of defendant Jones. There was no evidence in the present case that bolt cutters had been used in the burglary. They were given to the chief of police of Highland Park, Illinois, to assist him in investigating another crime. We reproduce part of the record to clarify this issue:

> *Defendant's counsel:* "Do you know anything about the circumstances in Highland Park, any of the facts of that situation which prompted the police down there to ask for those bolt cutters?
>
> "*Officer:* Yes, sir, I do.
>
> "Q. What and I realize this might be hearsay as far as Mr.—"

Whereupon, the jury was excused. Discussion was then had on the conversation between the officer and the Highland Park police concerning the alleged lack of relationship between defendant Jones and the bolt cutter, and counsel for defendant continued:

> *Counsel:* "Well, if the Court please. I'd like to have the jury hear this testimony that has just gone in on the record.
>
> "*The Court:* Well, some of it is all right. Some of it I am not going to let it be allowed, because the moment it was heard this Defendant Wright could move

> for a mistrial as to him. Any explanations which this Defendant (Jones) is alleged to have given him (Officer #3), in that type of questioning, as to how this got in here, may be put in, but this—none of this testimony is going to be allowed with the Chief of Police in Highland Park. That is out."

The court found this to be damaging and inadmissible testimony against Mr. Wright which was not relevant or material to any issue in the case.

Defendant Jones says that the trial court should have admitted the testimony of the officer and then carefully instructed the jury to disregard it as to defendant Wright. By his own admission, counsel for defendant Jones did not request the court to do so. The conversation with the Highland Park police chief was, indeed, damaging as to defendant Wright, and when its dubious benefit to defendant Jones is balanced, we cannot find any error in the refusal of the trial court to admit it. A jury cannot be told to disregard seriously damaging hearsay as to one defendant in order that it be admitted on behalf of the other defendant for irrelevant reasons. It is true that combined trials necessitate instructions to the jury to disregard evidence as to one defendant and consider it as to the other; but in cases of dubious benefit to both parties-defendant, we agree that the trial court had properly exercised its discretion in stopping such irrelevant cross-examination. *People v. McArron* (1899), 121 Mich 36.

Affirmed.

APPENDIX C

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The provisions of the Fourth Amendment to the Constitution of the United States are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. That portion of the Fourteenth Amendment to the Constitution of the United States that is pertinent here is:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The provisions of Article I, Section 11 of the Constitution of the State of Michigan, 1963, are:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable search searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."

APPENDIX D

(Testimony of LT. ARNOLD VAN DAM, Dec. 8, 1965)

Trial Trans. p. 144 et seq.

* * * * *

(144) Q. I see. Then Mrs. Jones was present then when you looked through the car?

A. Yes, sir.

Q. Did you ask her whether you could or not?

A. Yes, sir.

Q. What did she say?

A. She said she didn't like it, but if I give her the keys she'd open it up for me and that I could look it over.

Q. I see. And, did she do that?

A. Yes. She opened up the trunk; the car doors would not lock, didn't have to unlock those doors.

Q. Now, did you find anything in the trunk?

A. Nothing but the usual things with the exception of a bent tire iron, which I removed from the car.

Q. All right. What did you find in the car itself, anything?

(145) Mr. Rude: If the Court please. There is a question of law on search and seizure involved in this, and I would like to present that question of law to the Court in the absence of the Jury.

The Court: All right. Excuse the Jury.

(Whereupon the Jury retired from the court room) Time 10:15 a.m.

Mr. Rude: If the Court please. May the record show that on or about November 22, 1965, on behalf of Johnnie Mae Jones, one of the Defendants in this cause, I filed a motion to suppress certain evidence listed in the motion,

on the ground that this evidence was obtained by the officers, by unconstitutional search and seizure in violation of Section 11 of Article 1 of the Michigan Constitution, and in violation of the Fourth and Fourteenth Amendments of the Federal Constitution. I filed a brief in support of that motion, listing a number of cases in which the Supreme Court has found that a search and seizure under similar circumstances was held to be unconstitutional, and illegal, and the fruits of such search were held to be inadmissible.

As the record will show the Court denied (146) that motion yesterday morning. And, at this time I would like to renew the motion on the same grounds, on the same basis, and based upon the same cases, as I previously presented to the Court, and would hope that the Court, at this time, would reconsider its decision on that motion, and grant it, and exclude from evidence I think it was a crowbar, that was found under the back seat of the defendant's automobile.

* * * * *

(147) The Court: Several people, not just one, but three people at least called the police officers, and told them of this burglary in progress. Now, when the police officers come upon a scene where a burglary has been committed, and a car starts to ease away from that scene with its lights out, they have probable cause right there to stop that car.

Mr. Rude: We are not complaining about the stopping of the car.

The Court: Yeah. Now, they have probable cause in my judgment. Officer Van Dam before he conducted any search has testified that he conferred with the officers. Now, you have got to go back to the reasonableness of stopping her in the first instance by the officer who did stop her. I think frankly, it would appear to me that you are putting

the proof in a little bit in reverse order. The person who stopped her in the first instance, perhaps should be the police officer, who was first put on (148) the stand, and we put this in the exact chronological sequence that it happened in—I suggest that we could probably all make a little more sense out of it, if it were done in that order. And, I will have to say this—that I would suggest procedurally that you do that, and you reserve your right to renew this argument at the conclusion of the chronological sequence in which these events happened. You have got the officer on the scene who should be the first one, and what he learned from that officer, and from other officers before the search was instituted.

Mr. Johnson: The reason we did it this way, your Honor, is the problem of the crime laboratory man.

The Court: I know. But, the crime laboratory man doesn't become a competent witness to testify to anything until you have first established authoritatively in this proceeding, not in a Municipal Court proceeding, but in this Court, the right of the officer to have the tools in his possession. That would appear to me that we ought to take this witness off the stand, at this point, and put—and start the thing in the correct chronological order.

* * * * *

APPENDIX E

(TRIAL COURT'S DECISION ON DEFENDANT'S MOTION TO SUPPRESS)

Trial Trans. p. 234

• • • • •

(234) Q. All right. Now, your Honor, I believe Mr. Rude has his motion pending, and I don't know if he wants to argue it anymore or what.

(Colloquy off record.)

Mr. Rude: Well, we need a ruling on the motion. I don't know whether the Court wants any more argument on it or not.

The Court: The purpose in the deferring on your motion, Mr. Rude, was to see whether or not the testimony of the other officers as it unfolded would bring to light anything which would cause me to change my previous ruling, and I have not heard anything which would cause me to change, so I will reaffirm my previous ruling on the matter. You may go ahead.

• • • • •

APPENDIX F

(COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS

Trial Transcript p. 354 et seq.

(354) Mr. Rude: If the Court please. The Defendant, Johnnie Mae Jones, moves the Court to dismiss the charge against her, and to quash the information on the ground that the crowbar, and the accompanying exhibits, including the samples, that go with the crowbar—there is insufficient evidence to go to the jury as to the question of the guilt or innocence of Johnnie Mae Jones. I have already argued the matter of the admissibility of these exhibits, and I will not repeat that argument. I think it is already on the record, and there's been a brief filed. The only other evidence there is consists of the fact that Johnnie Mae Jones was in the vicinity at the time, and this in itself is not sufficient evidence of guilt to raise a jury question, and the Court should take the case from the Jury as a matter of law, and hold the crowbar to be inadmissible, and grant a motion at this time to dismiss the charge and quash the information as to Johnnie Mae Jones.

(Whereupon argument by Mr. Johnson was returned and the same is not transcribed herein by the reporter.)

Mr. Rude: I have no further argument on that, your Honor.

* * * * *

(356) The Court: The motions are denied as to both Defendants. You may bring in the jury.

* * * * *

APPENDIX G

APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan, Plaintiff-Appellee, v. Johnnie Mae Jones, Defendant-Appellant.	Circuit Court No. 12104 Court of Appeals No. 1722

Now comes defendant-appellant by her attorneys, Kobza & Kobza, and makes application for leave to appeal.

I.

On July 23, 1968, the Court of Appeals issued an opinion which decided that under the facts of this particular case the arresting officer had probable cause to believe that the defendant-appellant was engaged in a felonious act.

II.

The Court further held that a search of the defendant-appellant's car, without a warrant, under the circumstances of this case was not in violation of Michigan law or the Fourth Amendment to the U. S. Constitution and Article 1, Section 11 of Michigan Constitution (1963).

III.

The Court further held that certain testimony offered to the Court and jury on cross-examination of a prosecution witness was irrelevant to the issues in the case, and

was thereby properly excluded by the trial court because of its potential damaging influence against the case of a co-defendant.

IV.

It is proposed in this appeal that the Court of Appeals erred by not properly applying the rule set forth in *People v. Gonzales*, 356 Mich 247 (1959), and if this decision is allowed to stand, it is proposed that it effectively overrules the above cited decision of the Supreme Court.

V.

It is further proposed that the Court of Appeals erred by deciding that the search of defendant-appellant's car was a reasonable search under the circumstances and legal without the benefit of a warrant. The Court stated "This is admittedly a close question and we note that our decision is confined to these facts . . ." (page 11). It is suggested that the decision of the Appeals Court in this case has the effect of refusing to apply the U. S. Supreme Court decision, *Preston v. United States* (1964), 376 S Ct 364 (11 L ed 2d 777); it also has the effect of overruling two prior decisions of the Michigan Supreme Court, *People v. Kaigler*, 368 Mich 281 (1962) and *People v. Carr*, 371 Mich 251 (1963). Your petitioner suggests that the Appeals Court fully realized it was changing established case law when it advised that this case must be restricted to apply only to the facts of this case.

VI.

It is further proposed that the Court of Appeals erred in holding that proposed evidence was irrelevant and therefore properly disallowed by the trial judge. The trial attorney considered the testimony as important to his de-

fense, and the answers requested would have indicated to the jury that both of the burglar tools had been actually involved in another recent burglary in the Chicago area and were deposited in the defendant-appellant's car without her knowledge. It is inconceivable that such evidence can be judicially determined "irrelevant" to the proper defense of the charge against the defendant-appellant.

VII.

It is proposed that this appeal should be allowed to be heard before the Supreme Court because the subject matter involves the major legal principles regarding search and seizure of evidence in criminal cases, admissibility of evidence and restriction on the right of cross-examination; because the decision of the Court of Appeals is erroneous under the facts of the present case, and the conviction and sentencing of defendant-appellant effects a material injustice upon her right to liberty; because this decision conflicts with past case law as established by the Michigan Supreme Court, United States Supreme Court and the Michigan Court of Appeals. The above reasons are sufficient for an appeal to be allowed pursuant to Michigan General Court Rule 853.1 (1) (2) (3).

Wherefore, defendant-appellant prays that the Supreme Court grant her leave to application on these questions.

Respectfully submitted,

Kobza & Kobza,
By: James J. Kobza,
Attorneys for Defendant-Appellant,
404 Michigan Building,
Muskegon, Michigan.

Dated: August 12th, 1968.

APPENDIX H

ORDER FOR STAY OF PROCEEDINGS AND CONTINUANCE OF BAIL

(Michigan Supreme Court)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 12th day of December in the year of our Lord one thousand nine hundred and sixty-eight.

Present: the Honorable John R. Dethmers, Chief Justice, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Michael D. O'Hara, Paul L. Adams, Thomas E. Brennan, Associate Justices.

On order of the Court, the petition for stay of proceedings and continuance of bail is considered and viewed as one for continuance of bail pending recovery from an alleged serious illness. The circuit court will continue its 20-day stay order of October 25, 1968, for such limited period as will allow Chicago counsel sufficient time to comply fully with the circuit court's order for the furnishing of a medical transcript and a complete diagnosis and prognosis of defendant's condition.

The circuit court also will require of counsel that he assure the court more fully that the convicted defendant actually is the person to whom the presently submitted hospital records and medical certificates refer and identify, and thereupon will file with this Court a report containing copies of further papers received and judicial comment thereon.

Final order of this Court to follow after it is advised in conformity herewith.

Brennan, J., dissenting.

State of Michigan--ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 12th day of December in the year of our Lord one thousand nine hundred and sixty-eight.

Donald F. Winters,
Clerk.